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No. 00-1781

In The

Supreme Court of the United States

OAKLAND HOUSING AUTHORITY, HAROLD DAVIS,

Petitioners,

v.

PEARLIE RUCKER, HERMAN WALKER, WILLIE LEE, BARBARA HILL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

GARY T. LAFAYETTE
Counsel of Record
SUSAN T. KUMAGAI
LAFAYETTE & KUMAGAI LLP
100 Spear Street, Suite 400
San Francisco, CA 94105
(415) 357-4600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The National Housing Act directs public housing authorities to utilize leases that contain a clause allowing for termination of tenancy if the public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control engages in any drug-related criminal activity on or off the premises. 42 U.S.C. § 1437d(l)(6).

The question presented is:

Whether 42 U.S.C. § 1437d(l)(6) permits termination of a tenancy if a tenant did not know, or have reason to know, that a household member or guest engaged in drug-related criminal activity.

PARTIES TO THE PROCEEDING

The petitioners in this case are the Oakland Housing Authority and Harold Davis. The respondents are Pearlie Rucker, Herman Walker, Willie Lee and Barbara Hill. The other party to the proceedings is the United States Department of Housing and Urban Development.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-62a) is reported at 237 F.3d 1113. The opinion of the panel of the court of appeals (Pet. App. 90a-156a) is reported at 203 F.3d 627. The opinion of the district court (Pet. App. 63a-89a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2001. On May 24, 2001, petitioners' filed a petition for a writ of certiorari. Certiorari was granted on October 1, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

I. The pertinent provision of the Housing Act of 1937 provides as follows:

> Each public housing authority shall utilize leases which –
>
> (6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household or any guest or other person under the tenant's control, shall be the cause of termination of tenancy.

42 U.S.C. § 1437d(l)(6).

II. The pertinent HUD regulation provided as follows:

> A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereafter.
>
> . . .
>
> (f) Tenant's obligations. The lease shall provide that the tenant shall be obligated:
>
> . . .
>
> (12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
>
> (A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or
>
> (B) Any drug-related criminal activity on or near such premises. Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(i).

STATEMENT OF THE CASE

1. INTRODUCTION

This case profoundly affects the habitability and allocation of scarce public housing resources in the United States. Scarce, because for every unit of public

housing in existence, three low-income families are on waiting lists, sometimes waiting years for selection.[1] Habitability, because as those needy families wait, some existing tenants abuse the privilege of public housing, contributing in a variety of ways to the scourge of drug-related criminal activity in public housing developments. Yet, a divided Ninth Circuit Court of Appeals would prohibit agencies like petitioner, the Oakland Housing Authority ("OHA"), from attacking one significant component of this drug problem – the eviction of those who harbor and shelter individuals who menace their neighbors by participating in this type of conduct.

There are at least three classes of residents who participate in this conduct. The first are tenants of public housing who participate in illegal drug activity themselves. No one suggests that such tenants may not or should not be replaced by law-abiding households. The second class is comprised of tenants who contribute to the drug problem passively, but no less significantly. Such tenants, for example, are aware of drug activity by guests or household members but for a variety of reasons, do little or nothing to stop the conduct,

This case involves the third category of tenants. As the present case well illustrates, many drug violators are afoot as guests or household members without the admitted knowledge of the responsible tenants – or at least without *provable* knowledge. Yet, such tenants too, are very much part of the problem. They are harboring illegal

---

[1] (D. Saffran, Public Housing Safety Versus Tenants' Rights, 6 THE RESPONSIVE COMMUNITY 34 (Fall 1996) at 35.)

drug activity, even if unwittingly. Therefore, reallocating their units to equally deserving, needy but drug-free households will improve the habitability of the developments just as much as replacing those who violate drug laws personally.

Whether a majority of this Court generally agrees with the policy of terminating the tenancies of this third category of tenants as a means to eliminate drug-related criminal activity or not, the policy has been embraced by Congress and the responsible federal agency, petitioner Department of Housing and Urban Development ("HUD"), as a means for public housing authorities to provide safe and decent housing to their other residents.

Congress requires every public housing agency to use leases which:

> (6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, or any drug related criminal activity on or near such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437d(l)(6) (1999).

Moreover, HUD's regulations implementing the Act directly address the issue of a tenant defense based on an alleged lack of personal knowledge of unlawful drug activity. HUD's *Public Housing Lease and Grievance Procedures*, 24 C.F.R. § 966.4(l)(1)(B); 56 Fed.Reg. 51,560, 51,567, (Oct. 11, 1991), squarely states that:

> The tenant should not be excused from contractual responsibility by arguing that the tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

The principal issue before this Court, therefore, is whether HUD's interpretation of the Act is "a permissible construction of the statute," *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), according to the required deference to the agency charged with administering the Act.

This brief will demonstrate that HUD's interpretation is not merely "permissible," but unavoidable.

2. THE SITUATION IN OAKLAND

Public housing in Oakland, California, is not immune from the drug/crime epidemic that has been sweeping this country for more than two decades. OHA provides housing for some 8,000 individuals in 3,308 apartment units.[2] Yet, from June 1998 to the present, the OHA Police Department made over 700 felony arrests for drug-related criminal activity in or near OHA housing developments.[3] And, the arrest rate has been steadily increasing during this period, with 250 felony arrests from January through

---

[2] OHA Tenant Data (Nov. 2001). These figures do not include section 8 households of which OHA administers 10,055 vouchers, and which leases encompas 27,830 household members.

[3] Oakland Housing Authority, Police Department, Crime Data (Nov. 2001).

November 6, 2001.[4] These figures do not include misdemeanors and citations related to illegal drug activity. It is safe to say there is far more actual illegal drug activity at Oakland's public housing developments than those resulting in arrests. The conduct that forms the basis for the above statistics are just those of which OHA is aware.

There is an ironic source of confirmation of the seriousness of this problem in Oakland. In November 1994, 54 OHA public housing residents filed a lawsuit against OHA, former executive director Harold Davis and related defendants complaining that they failed to provide "decent, safe and sanitary conditions" for tenants. (J.A. 27-29; R. 95-96, 100, 108)[5] The plaintiffs even alleged that the defendants "conspired" to create a "public nuisance" by allowing "drug-dealers" to use the "common areas" and that the inadequate security had subjected plaintiffs to threats, harassment, intimidation and other offensive and/or criminal conduct. (J.A. 27-29; R. 112, 113) Indeed, the attorney for the plaintiffs in the *Oliver* case – who also represents respondents in this case – stated on the record that it is the landlord's obligation under the law to eliminate drug problems. In that regard, he stated:

> The law is that a landlord has to provide security. If there's drug problems, the law says the landlord has to eliminate that problem. That's the law, ma'am. That is the law. (R. 96)

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[4] *Id.*

[5] The case was filed in the California Municipal Court, County of Alameda, and was entitled *Alice Oliver, et al. v. Harold Davis, Oakland Housing Authority, et al.*, Case Number 574817 ("Oliver case"). (R. 95.)

And, typical of the plaintiffs in the *Oliver* case, one tenant testified that she expected OHA to remove drug dealers from the housing development. (R. 96)

3. THE LEASE PROVISIONS IN ISSUE

In accordance with 42 U.S.C. § 1437d(l)(6), OHA required all of its tenants to execute three documents reflecting their agreement to insure that drugs and criminal activity do not take place. Each of the four tenants/respondents in this case, Herman Walker ("Walker"), Pearlie Rucker ("Rucker"), Willie Lee ("Lee") and Barbara Hill ("Hill") (hereinafter collectively referred to as the "Tenants"), executed all the relevant documents. (J.A. 45-48, 49, 59, 67, 68-70; R. 58, 60, 62, 70-77, 80, 88-90, 92, 94).

First, OHA's standard lease contains the following language:

> **9. OBLIGATIONS OF TENANT, MEMBERS OF HOUSEHOLD AND GUESTS**
>
> Tenant is obligated to comply with the following rules. Tenant is also responsible for causing members of the household and guests to comply with the following:
>
> * * *
>
> l. To conduct himself/herself and cause other persons who are in the dwelling unit or in the common area of development with tenants consent to conduct themselves in a manner which will not disturb neighbors (including those neighbors who are not tenants of low rent public housing) peaceful enjoyment of their housing and which will

be conducive to maintaining the development in a decent, safe and sanitary condition.

m. To assure that the tenant, any member of the household, a guest, or other person under the tenants control, shall not engage in

(i) any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other public housing residents, or threatens the health and safety of the housing authority employees (e.g., violent acts, possession of illegal firearms, electric/gas meter tampering, etc.)

(ii) Any drug related criminal activity on or near the premises (e.g., manufacture, sale distribution, use, or possession of illegal drugs or drug paraphernalia, etc.)

(Hereinafter, "Paragraph 9(l)" and "Paragraph 9(m)," respectively.) (J.A. 59; R. 70).

In addition, Paragraph 14 of OHA's lease provides in part, as follows:

14. TERMINATION OF THE LEASE

* * *

d. Management may terminate or refuse to renew this lease for a Tenant's serious or repeated violation of material terms of this lease, such as not making payments due, not complying with paragraph 9, or other good cause.

(Hereinafter, "Paragraph 14(d).") (J.A. 64; R. 71)

OHA also has each resident execute an "Occupant's Responsibility" form wherein, among other things, each tenant acknowledges the following:

> Should I violate the terms and conditions of my lease, I am aware that I could be subject to legal action.

(J.A. 68; R. 60)

Lastly, each tenant executes a "Tenant Agreement To Maintain A Drug-Free environment" (the "Tenant Agreement") which provides, in part, as follows:

> The Oakland Housing Authority's (OHA) policy on drugs and drug-related criminal activity has been explained to me by my Housing Manager. Additionally, I have been told about the federal regulation regarding the "One Strike" policy, which states that I may be evicted from public housing for illegal use of a controlled substance or abuse of alcohol which interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents by myself, any member of my household or guests.
>
> I am aware of Paragraph 9, Section M, of my Lease Agreement which specifically prohibits the use, sale or possession of any illegal drugs or drug paraphernalia on OHA property by myself, any member of my household or guests. I am also aware that any drug-related criminal activity on or off the premises, not just on or near the premises, by myself or any member of my household is prohibited. I understand that if I or any member of my household or guests should violate this lease provision, my tenancy may be terminated and I may be evicted.

(J.A. 68-70; R. 62)

4. THE GROUNDS FOR THE PRESENT EVICTIONS

Between December 1997 and early 1998, each of the Tenants was served a complaint for unlawful detainer of premises by OHA. (J.A. 30-37, 41-42; R. 3, 5, 7, 8, 16, 20, 24, 28, 31). It is beyond dispute that the grounds for each unlawful detainer action was the use and/or possession of illegal drugs by the Tenants' household members or guests. For Rucker, Hill and Lee, actual household members were found on or near OHA premises engaged in illegal drug activity. Walker's guests were found with illegal drugs in and near his own unit.

The unlawful detainer complaint against Rucker alleged as follows:

> On March 9, 1997 an Oakland Housing Authority officer on patrol in the 2200 block of E. 19th Street, observed defendant's daughter Gelinda Rucker, who is listed on defendant's lease as a resident, drinking an alcoholic beverage in public. When the officer contacted Rucker she attempted to conceal the alcohol. Rucker, who was near defendant's complex, appeared to be under the influence and was arrested for being drunk in public. A search of defendant revealed on [sic] rock of suspected cocaine and a crack cocaine pipe. She was additionally charged with possession of narcotics and paraphernalia. Rucker listed defendant's [Pearlie Rucker] address as her residence.
>
> On September 19, 1997, Oakland police officers on patrol in the 1400 block of 23rd Avenue, which is an area high in use and sale of narcotics, observed defendant's son Michael Rucker and William Knight loitering at a bus stop. Rucker was contacted and subsequently arrested for a warrant. As officers searched Rucker, they recovered a piece of rock cocaine. He was additionally charged with possession of narcotics. Rucker, who is not listed on defendant's lease as a resident, listed defendant's address as his residence [Pearlie Rucker].

(J.A. 12, 42; R. 3, 4).

Rucker contends that her adult daughter is mentally disabled and had a longstanding problem of alcohol abuse. (J.A. 43-44; R. 28, 29) After Rucker was served with the unlawful detainer complaint, Rucker's daughter was incarcerated, removed from the OHA residence, placed in a drug program where she no longer posed a threat to other tenants. *Id.* Thereafter, on February 17, 1998, OHA dismissed its unlawful detainer action against Rucker (Pet. App. 29a)

The complaints for unlawful detainer against Lee and Hill alleged that on November 6, 1997, OHA officers responded to complaints by residents that individuals were using narcotics and loitering in the OHA parking lot. There, the officers found Hill and Lee's grandsons, both listed as residents on their respective leases, in possession of, and smoking, marijuana. Lee's grandson was cited for possession of the drug. (J.A. 30-35; R. 7, 8).

Walker is a senior citizen and resides in a development reserved exclusively for senior and disabled residents. He alleges that he is disabled and in need of home nursing care. (J.A. 36-37) As such, there is the ever present suggestion that his care-giver, someone he allegedly relied upon for medical care, has placed him under the threat of eviction by participating in illegal drug activity

without his knowledge. Yet, the charges against him indicated that, in addition to his "care-giver," other "guests" were in his unit participating in illegal and dangerous drug activity. (J.A. 37-39) The unlawful detainer complaint against Walker, filed on December 1, 1997, alleged the following:

> On August 7, 1997, Oakland Housing Authority officers conducting a security check at your complex, which is a senior citizen building, contacted Kelly Shine. Shine, who was not a senior citizen and very fidgety showed signs of being a narcotics user. Officers contacted Shine and a check was conducted. Officers discovered that Shine is on probation with a search clause for narcotics. Officers invoked the search privilege recovering one rock of cocaine and a cocaine pipe. Shine was arrested for possession of narcotics and paraphernalia. Shine told officers she was at your [Herman Walker's] unit with a friend who lived with you. You are the only resident listed on your lease.
>
> Officers went to your unit and contacted you. You gave officers permission to search your unit, and once inside they contacted Shine's minor child, Shirley Hardaway, who was wearing a thin nightgown and appeared to be residing in your unit, Marguerite Wise and Eleanor Randle, who has had several narcotics arrests at your complex.
>
> As officers searched your unit, they recovered a cardboard box inside your bedroom containing a plate with suspected rock cocaine chips and four metal crack cocaine pipes. Randle, who had a cocaine pipe pinned inside her jacket, was

> arrested for possession of narcotics paraphernalia. In addition, officers observed a large amount of women's clothing and personal items throughout you [sic] unit. You denied that anyone was residing with you. A lease violation was drafted.
>
> A week later, August 12, 1997, OHA officers and your housing manager returned to your unit to conduct a follow-up check. During the August 7 contact with you, officers had observed a sign posted on your front door stating "oxygen no smoking." However, your guests were smoking inside your unit. During that contact officers also observed an oxygen machine and several oxygen bottles. As officers and you [sic] manager entered your unit with your permission, they again contacted Hardaway in your bedroom wearing a night gown and robe. You again denied that Hardaway resided in your unit. Officers found a rock cocaine pipe inside a bag of hair rollers. As officers informed you of the paraphernalia you stated, you could not control what people brought into your unit. A lease violation was drafted.
>
> On October 11, 1997, Oakland Housing Authority officers conducting a security check inside your complex, contacted Eleanor Randle in the lobby area. Randle told officers she had just left your unit and her friend Shirley Hardaway was still inside your unit. Officers were aware of Randle's narcotic activity and prior arrest at your unit. Officers contacted you in your unit and you consented to a search. Once inside, officers contacted Shirley Hardaway sitting on a sofa in your living room. Hardaway was asked to sit in another area as officers conducted their

> search. In the creases of your sofa where Hardaway had been sitting officers received a glass cocaine pipe. Hardaway admitted to using rock cocaine, but denied that the pipe belonged to her. Hardaway was cited for possession of narcotics paraphernalia.

(J.A. 37-39; R. 24, 25).

Each of the Tenants insists he/she had no knowledge of any of the foregoing activities or any other criminal drug activity on OHA premises. (J.A. 30-35, 39, 43-44; R. 16, 17, 20, 26, 29, 30).

5. THE DISTRICT COURT PROCEEDINGS

The Tenants filed the present action in the United States District Court for the Northern District of California on February 27, 1998. (J.A. 1) A First Amended Complaint was filed on March 4, 1998, alleging, inter alia, violation of the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (the "APA"), because 42 U.S.C. § 1437d(l)(6) does not authorize their evictions as "innocent tenants" (the "complaint"). (J.A. 2, 10-26) The Tenants also argue that if the statute does authorize such evictions, it is unconstitutional. *Id.* Walker further alleges his eviction violates the Americans with Disabilities Act ("ADA"). (J.A. 24; R. 1-14)

Ironically, the complaint alleges that OHA and its former Executive Director, Harold Davis, are violating the law because of the actions they took to fight drug-related criminal activities at OHA's housing developments. (J.A. 10-26) Four years earlier, however, the same tenants' counsel represented the *Oliver* tenants who sued OHA

and Mr. Davis for *failing* to take action against the drug problem. (J.A. 27-29; R. 112, 113)

In any event, the Tenants moved for a preliminary injunction against enforcement of the lease provisions in question and, HUD and OHA moved to dismiss the Tenants' complaint. The two motions were heard together on June 2, 1998. (Pet. App. 63a).

The district court concluded that the Tenants established a fair chance of success on their claim that HUD's interpretation of 42 U.S.C. § 1437d(l)(5) was inconsistent with the statute itself and, thus violated the APA.[6] (Pet. App. 83a) In arriving at its conclusion, the District Court determined that § 1437d(l)(5) is silent as to whether Congress intended to authorize the eviction of "innocent tenants" (Pet. App. 72a) The district court found that HUD's interpretation of the statute was unreasonable and the policy appeared irrational on its face. (Pet. App. 84a). The district court also determined that HUD's interpretation raised substantial concerns with respect to the Tenants' First Amendment right to freedom of association. (Pet. App. 85a)

Finding that the balance of hardships tipped in favor of the Tenants, the district court issued a preliminary injunction enjoining OHA from terminating the leases of tenants pursuant to Paragraph 9 (m) for drug-related criminal activity that does not occur within the tenant's apartment unit when the tenant did not know of, and had

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[6] With regard to the motion to dismiss, the court denied in part and granted in part. (Pet. App. 87a-88a).

no reason to know of, the drug related criminal activity. (Pet. App. 86a-87a).[7]

6. THE PROCEEDINGS IN THE NINTH CIRCUIT

The panel of the Ninth Circuit Court of Appeals held that the plain statutory language authorized OHA's eviction actions regardless of whether the Tenants were aware that their household member or guest was engaging in drug-related criminal activity. (Pet. App. 111a-112a, 136a).[8] The panel also found that the statute did not violate the First Amendment right to freedom of association, the Fourteenth Amendment right to association, or the Eighth Amendment prohibition of excessive fines. (Pet. App. 130a-134a) Accordingly, the panel reversed the order granting the preliminary injunction and vacated the injunction. (Pet. App. 136a).

A rehearing en banc was ordered on August 18, 2000. (Pet. App. 2a). On January 24, 2001, a sharply divided en banc panel, on a 7 to 4 vote, affirmed the district court's grant of preliminary injunction and enjoined OHA from "pursuing evictions under paragraph 9(m) to the extent it seeks to do so for off-premises drug-related activity in

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[7] Although not before this Court, the district court also held that Walker had established a fair chance of success on his ADA claim reasoning that because Walker's disability prevents him from living without a care-giver, he is at greater risk for termination of tenancy than tenants who do not require in-home care. (Pet. App. 77a-80a)

[8] Judge O'Scannlain's opinion was joined by Judge Sneed. Judge Fletcher wrote a dissenting opinion. (Pet. App. 94a).

which the tenant did not know or have reason to know of the criminal activity." (Pet. App. 30a.)

Rejecting HUD's own interpretation of the statute, the majority concluded that Congress "had an intention on the precise question at issue that is contrary to HUD's construction." (Pet. App. 15a-16a) It concluded that HUD's interpretation was inconsistent with Congressional intent. (Pet. App. 22a) Relying on a hypothetical far removed from the facts of record, the majority concluded that HUD's interpretation would lead to "an odd or absurd result." (Pet. App. 24a-26a)

Ninth Circuit Judge Joseph T. Sneed, writing for himself and three other members of the en banc panel, filed a lengthy dissenting opinion explaining why HUD's interpretation of the relevant statute was both permissible and correct. (Pet. App. 33a-62a)

And, it is notable that only one week ago, on November 7, 2001, a unanimous Eleventh Circuit panel relied extensively on Judge Sneed's dissenting opinion to reach the same conclusion in *Burton v. Tampa Housing Authority*, ___ F.3d ___, 2001 WL 1379724 (11th Cir. Nov. 7, 2001).

SUMMARY OF ARGUMENT

A. 42 U.S.C. § 1437d(l)(6) provides for eviction from public housing when a "tenant, any member of the tenant's household, or any guest or other person under the tenant's control" engages in "any drug-related criminal activity on or off the subject premises." When construed according to its ordinary meaning, the statute's language

provides for termination of leases for any drug-related criminal activity, whether or not the tenant knew of, or reasonably should have known of, the conduct. That conclusion draws strong additional support from the statutory context of the provision.

First, the forfeiture clause of the Controlled Substances Act, 21 U.S.C. § 881(a), does not lead to an adverse finding regarding the regulations promulgated by HUD. The forfeiture clause provides, in part, that property shall not be forfeited by reason of any act or omission of which the owner did not commit and without the owner's knowledge or consent. The reference to "knowledge" in the clause does not lead to a requirement of "knowledge" in § 1437d(l)(6). To the contrary, the law is established that if Congress includes particular language in one section of a statute and omits it in another, it is presumed that Congress acted intentionally and purposefully. By the omission of a "no knowledge" defense in § 1437d(l)(6), Congress' intent was to not allow such a defense for drug-related criminal activity by a public housing tenant, a household member or a guest.

Second, up until 1996, Congress provided those evicted from public housing under § 1437d(l)(6), who did not know of the criminal activity, a waiver to the waiting period for preference selection for public housing. 42 U.S.C. § 1437d(c)(4)(A). Clearly, the statutory waiver language establishes by implication, Congress' intent that a tenant may be evicted for the drug-related criminal activity of a household member or guest, even if the tenant did not know about the conduct.

B. In light of the clarity of the statutory language, it is unnecessary to resort to legislative history. However, to the extent the history is considered, it fails to support the Ninth Circuit majority's position that the statute does not apply to an "innocent tenant." The congressional committee report to which the court of appeals refers in support of its position, reflects Congress' intent that PHAs judge each case on its individual merits and to defer the decision to evict to the wise exercise of humane judgment by the PHAs and the eviction courts. Congress merely provided an example that eviction might not be appropriate if the tenant had no knowledge of the criminal activities or had taken reasonable steps under the circumstances to prevent the conduct. S. Rep. No. 101-316 at 179 (1990). However, Congress by no means said the example was the rule.

Fatal to the court of appeals' contention is the fact the passage it relies upon was not reflected in any language of the statute. Instead, 42 U.S.C. § 1437d(c)(4)(A), provided a waiver to the waiting period for preference to tenants who were evicted but did not participate in, and had no knowledge of, criminal activity. This statute was effective until 1996, five years after the date of the committee report reflected herein. Further, the legislative history should be read in light of the overall purpose of the Housing Act to provide safe and decent housing, and to vest PHAs the maximum authority to manage its operations and with discretion in evaluating cases.

C. Equally without merit, is the use of a hypothetical to reach the position that HUD's interpretation of the statute would lead to absurd results. Cases are decided on the factual controversy before the Court. This Court

has rejected hypotheticals in determining the construction of statutes. Indeed, the facts in this case are not in any way similar to the hypothetical facts presented by the court of appeals.

D. The eviction of ignorant tenants does not violate the United States Constitution.

1. The Housing Act provides a benefit and Congress is entitled to allocate these benefits under terms and conditions it determines to be appropriate. Even if a determination is made that the statute may pose a hardship on some family members, the Court must defer to the Congressional view of what constitutes a wise policy. The statute at issue here is reasonably related to an important governmental purpose, the elimination of drug-related criminal activity in public housing and it facilitates the duty of PHAs to provide safe and decent housing to deserving low income families.

2. Eviction under the terms and conditions of public housing leases does not constitute a punishment. Hence, the statute does not fall within the parameters of an excessive fine. Moreover, eviction under the circumstances by the present case does not constitute an extraction by the government of payment, in cash or in kind. The purpose of the Excessive Fines Clause is to limit the government's power to enrich itself by punishing its citizens. Clearly, that is not the case here where evictions will provide housing to deserving families on waiting lists for public housing.

3. HUD's interpretation of the statute does not violate a tenant's right to freedom of association. To the extent this right is in any way affected, the cause is drug

activity by the tenant, someone in the tenant's household or a guest. The tenant and household members, participants in the drug activity, are free to live someplace other than public housing. To the extent the statute arguably impinges on some rights, it is justified. A regulation that interferes with certain governmental benefits, if reasonably related to a legitimate government interest, is not unconstitutional.

E. HUD's interpretation of the statute does not violate the provision prohibiting public housing leases from containing unreasonable terms and conditions. 42 U.S.C. § 1437d(l)(1). In this case, the eviction of ignorant tenants is rationally related to the government's purpose of eliminating of drugs and drug-related criminal activity within public housing and is rationally related to the Housing Act's purpose of providing safe, decent and affordable housing to the law-abiding citizens of this country.

ARGUMENT

I. The Pertinent Law

The Housing Act of 1937 (the "Housing Act"), was intended to assist states and localities to provide affordable housing for low-income families. 42 U.S.C. § 1437. The statute vests responsibility for managing, maintaining, and operating public housing developments in local public housing agencies ("PHAs") rather than the federal government. Indeed, Congress intended to vest maximum authority in PHAs. *Vandermark v. Housing Authority of City of York*, 492 F.Supp. 359 (D.C. Pa. 1980), *aff'd*, 663 F.2d 436 (3rd Cir. 1981).

As stated at the outset, Congress responded in 1988, to the growing problem of drug-related crime at public housing developments. In enacting the Anti-Drug Abuse Act of 1988, 42 U.S.C. § 11901 (the "Anti-Drug Act"), Congress made the following findings:

> (1) the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs;
>
> (2) public and other federally assisted low-income housing in many areas *suffers from rampant drug-related crime;*
>
> (3) *drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;*
>
> (4) *the increase in drug-related crime not only leads to* murder, muggings, and other forms of *violence against tenants,* but also to a deterioration of the physical environment that requires substantial government expenditures; and
>
> (5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of the recent reduction in Federal aid to cities.

42 U.S.C. § 11901(1)-(5). (Emphasis added.)

In accordance with those findings, Congress granted PHAs the discretion, among other things, to evict tenants whose household members or guests engage in drug-related criminal activity. In so doing, Congress mandated that a provision be included in every PHA lease permitting termination of tenancy under circumstances related

to drug activity. Today, the statute provides in pertinent part:

> Each public housing agency shall utilize leases which:
>
> > (6) provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household or any guest or other person under the tenant's control, shall be the cause of termination of tenancy.

42 U.S.C. § 1437d(l)(6) (1999).[9]

In 1991, HUD issued regulations to implement § 1437d(l)(6), requiring PHAs to impose a lease obligation on tenants as follows:

> A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereafter.
>
> . . .
>
> (f) Tenant's obligations. The lease shall provide that the tenant shall be obligated:
>
> . . .
>
> (12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:

---

[9] The language of § 1437d(l)(6) (formerly § 1437d(l)(5)) was revised in 1996, from "on or near," to "on or off public housing premises." *Id.* (1997)

> (A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the PHA's public housing premises by other residents or employees of the PHA, or
>
> (B) Any drug-related criminal activity on or near such premises. Any criminal activity in violation of the preceding sentence shall be cause or termination of tenancy, and for eviction from the unit.

24 C.F.R. § 966.4(f)(12)(i).[10]

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[10] Effective June 25, 2001, 24 C.F.R. § 966.4(f)(12)(i) was amended to clarify the distinctions between the categories subject to the regulation as follows:

> (f) Tenant's obligations. The lease shall provide that the tenant shall be obligated:
>
> * * *
>
> (12) (i) To assure that no tenant, member of the tenant's household, or guest engages in:
>
> (A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or
>
> (B) Any drug-related criminal activity on or off the premises;
>
> (ii) To assure that no other person under the tenant's control engages in:
>
> (A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or
>
> (B) Any drug-related criminal activity on the premises;
>
> (iii) To assure that no member of the household engages in an abuse or pattern of abuse of alcohol that

HUD also issued regulations to provide PHAs with the kind of discretion OHA exercised in the present case in connection with the Respondents – discretion to consider all relevant circumstances on a case-by-case basis. The regulation provides:

> (i) PHA discretion to consider circumstances. In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit. A PHA may require a family member who has engaged in the illegal use of drugs to present evidence of successful completion of a treatment program as a condition to being allowed to reside in the unit.

24 C.F.R. § 966.4(l)(5)(i).

Further, HUD's regulations specifically addressed the issue of tenants' purported ignorance of, or inability to prevent, the proscribed activities:

> The tenant should not be excused from contractual responsibility by arguing that the tenant

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> affects the health, safety, or right to peaceful enjoyment of the premises by other residents.

24 C.F.R. § 966.4(f)(12)(i) (2001).

did not know, could not foresee, or could not control behavior by other occupants of the unit.

24 C.F.R. § 966.4(l)(1)(B).

II. The Statute Plainly Authorizes Eviction For Prohibited Drug Activity By Guests Or Household Members Even If the Tenant Claims Ignorance of Such Activity.

The first step in reviewing HUD's construction of 42 U.S.C. § 1437d(l)(6), is to determine whether Congress has directly spoken to the precise question at issue. *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984). "If the intent of Congress is clear, that is the end of the matter . . . " *Id.* If the language is silent or ambiguous with respect to the precise issue at hand, "the question for the court is whether the agency's answer is based on a permissive construction of the statute." *Id.* at 842-843. HUD's legislative regulations are given "controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute." *Id.* at 843-844.

If HUD rendered a "permissible construction of the statute," the Court may not substitute its own judgment for the agency's interpretation of the statute. *Chevron, supra*, 476 U.S. 837, 843-844. The agency is entitled to "considerable deference" and a court need not find that the agency's interpretation is the only permissible construction of the statute, but only that it is a sufficiently rational one to preclude a court from substituting its judgment for that of the agency. *Young v. Community Nutrition Inst.*, 476 U.S. 974, 981 (1986). The plainness or

ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

A. Congress Made *"Any"* Drug-Related Activity by A Guest Or Household Member Grounds For Eviction.

The statute provides for eviction from public housing when a "tenant, any member of the tenant's household, or any guest or other person under the tenant's control" engages in *"any* drug-related criminal activity on or off the subject the premises." 42 U.S.C. § 1437d(l)(6). (Emphasis added).

"Absent an indication from the legislative body that a specific legal meaning is intended, 'the court may look to services such as dictionaries for a definition.' " *United States v. King*, 244 F.3d 736, 740 (9th Cir. 2001), citing *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999) and *Muscarello v. United States*, 524 U.S. 125 (1998). Read naturally, the word "any" has an expansive meaning that is, "one or some indiscriminately of whatever kind." *United States v. Gonzalez*, 520 U.S. 1, 5, citing Webster's Third New International Dictionary 97 (1996).

Here, the statute plainly includes four separate categories: (1) the tenant, (2) the household member, (3) the guest, or (4) other persons under the tenant's control. (*See, also* 24 C.F.R. § 996.4(f)(12)(i) (2001)). The disjunctive particle "or" is used as a function word to indicate an alternative between different or unlike things. The *City of*

Toledo v. Lucas County Budget Commission, 294 N.E.2d 661, 663 (1973).

Although HUD considered comment from tenant organizations advocating that tenants should not be required to assure the non-criminal conduct of household members beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, HUD issued regulations giving PHAs the discretion to evict tenants under these circumstances. 56 Fed.Reg. 51560, 51566, 51567 (1990); *Rucker*, 237 F.3d at 1134 (Sneed, J., dissenting) (Pet. App. 46a-47a); 56 Fed.Reg. at 51566. In so doing, HUD, among other things, concluded that the tenant should not be excused from contractual responsibility by arguing that the tenant did not know, could not foresee, or could not control the behavior of other occupants. 56 Fed.Reg. at 51567.

Since issuing the foregoing regulations, Congress amended the pertinent statute without overruling or rejecting HUD's interpretation of the statute. 56 Fed.Reg. 51567. Congress' failure to change the scheme set forth by HUD is significant. "Congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the agency's interpretation is the one intended by Congress." *Young, supra*, 476 U.S. at 983.

Despite the plain language of the statute, the Ninth Circuit majority reasoned that the tenant must be able to "realistically exercise control" over a household member or guest before eviction is possible. *Rucker*, 237 F.3d at 1126 (Pet. App. 28a). However, the plain language fails to support this interpretation. To conclude otherwise would cause the categories listed to be superfluous and the law

is well established that courts should read statutes with the assumption that Congress intended each of its terms to have meaning and should hesitate to treat statutory terms as surplusage. *Rucker*, 237 F.3d at 1130 (Sneed, J., dissenting) (Pet. App. 37a-38a); *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994)). The plain reading of the statute simply does not support the majority's or the Tenant's interpretation that actual "control" of a household member and/or guest is required for eviction of a tenant.

When a statute's language is straightforward, there is no room for speculation about congressional intent. *United States v. Gonzalez*, 520 U.S. 1, 9 (1997). It should be assumed that the legislative process is expressed by the ordinary meaning of the words used in the statute. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

In this case, as in *Gonzalez*, there are no words in the statute that tend to show that the word "any " is not used in its ordinary sense. There are no terms, words or phrases, to modify or limit the word "any." Hence, there is no basis for limiting the word in the statute. *Id.*

The plain language can only support HUD's interpretation of the statute. Simply, there is no language in the statute to support the majority's interpretation that the statute applies only if the tenant had knowledge of the drug-related criminal activity engaged in by household members or guests.

B. The Hypothetical To Support An Absurd Result Should Be Rejected.

The Ninth Circuit majority explained that HUD's interpretation would lead to absurd results. In that regard, the majority proffered a factual situation where "a tenant could be evicted if that tenant's guest used drugs 'five years earlier on the other side of the country.' " *Rucker*, 237 F.3d at 1124. (Pet. App. 25a).

The hypothetical facts presented by the majority are not supported by the record in this case. Moreover, this Court has rejected similar theoretical disputes and hypotheticals in its review of the construction of statutory language. *FCC v. Pacifica*, 438 U.S. 726, 743 (1978); *Lindsey v. Normet*, 405 U.S. 56, 64-65 (1972); *Allen-Bradley Local No. 1111 United Electrical Radio and Machine Workers of America v. Wisconsin Employment Relations Board*, 315 U.S. 740, 746 (1942); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 584-587 (1998).

In *Atlantic Mutual Insurance Co. v. Commissioner of Internal Revenue Services*, 523 U.S. 382 (1998), this Court refused to find the agency's interpretation of a statute was unreasonable despite the possibility of future error presented by the court of appeals. *Id.* at 390.

The facts of the present case are not even close to the hypothetical situation presented by the Ninth Circuit majority. Here, the unlawful detainer complaints against the relevant tenants were served within weeks of the prohibited drug activity. Moreover, all the drug-related criminal activity in this case occurred either in the tenant's own unit or on, or near, the OHA premises where

the subject unit was located. In short, the relevant incidents here involved use of illegal drugs near in place and time.

Neither of the Tenants' cases present the facts reflected in the majority's hypothetical and petitioners are unaware of any case addressing the issues herein reflecting facts similar to those presented by the majority.

Instead, the Ninth circuit majority presented an "horrific example" to reach an absurd result. If a household member were to smoke marijuana in New York, 5 years earlier in time, OHA and other tenants of OHA, would be unaware of the situation in order to instigate eviction proceedings on that basis. The hypothetical is simply "unrealistic" and should be rejected by the Court. *Atlantic Mutual, supra*, 523 U.S. at 390.

C. The Statutory Context Supports HUD's Interpretation To Allow Evictions Of Ignorant Tenants.

1. The Omission Of A Knowledge Requirement, Like That Included In the Forfeiture Clause, Is Evidence Of Congress' Intent To Allow Evictions Of Ignorant Tenants.

Where Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in a disparate inclusion or exclusion. *Russello v. United States*, 464 U.S. 16, 23 (1983). When qualifying language is absent in one statute, but is present in a related statute, "Congress' silence

. . . speaks volumes." *United States v. Shabani*, 513 U.S. 10, 14 (1994).

In the same chapter and subtitle of the Anti-Drug Abuse Act of 1988, Congress passed 42 U.S.C. § 1437d(l)(6) and (b) and, at that time, also amended the civil forfeiture provision of the Controlled Substance Act, 21 U.S.C. § 881(a). The forfeiture provision provides as follows:

> (7) All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to comment, or to facilitate the commission of, a violation of this subchapter . . . *except that no property shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.*

21 U.S.C. § 881(a)(7)[11]. (Emphasis added.)

The Ninth Circuit majority argued that the defense reflected in the forfeiture statute, that provides an exception for those leasehold owners who had no knowledge of the illegal conduct, must be read into § 1437d(l)(6) and, therefore, Congress had no intention to evict "innocent" tenants. But, the statute plainly omits the defense and states otherwise. And, the law is established that the fact Congress expressly provided a defense in the forfeiture

[11] 21 U.S.C. § 881(a)(7) is now codified at 18 U.S.C. § 983(d).

statute, and did not do so in § 1437d(l)(6), clearly indicates by its omission its intent to not so restrict the provision at issue here. *Russello, supra; Shabani, supra.*

Moreover, legislative history shows, among other things, that Congress recognized a difference between seizure of property and eviction of tenants. *Rucker*, 237 F.3d at 1132-1133 (Sneed, J., dissenting). (Pet. App. 43a). In that regard, "use of seizure rather than eviction cuts through the usual drawn out process of first notifying the drug dealers that they would be evicted and then battling them in court, sometimes for years, before they could be removed." *Id.*, citing 134 Cong. Rec. E1965-02 (1988).

In addition, in a 1989 Congressional hearing, the associate director of the American Civil Liberties Union ("ACLU") argued that PHAs should not be allowed to evict a tenant unless they can prove that a tenant had knowledge and actual control of the wrongdoer. *Burton v. Tampa Housing Authority*, ___F.3d___, 2001 WL 1379724, *5 (11th Cir. Nov. 7, 2001) citing *Drugs in Federally Assisted Housing: Hearings on F.566 before the subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, S. Doc. No. 101-234, at 90-91 (1989). Despite the arguments and several examples presented where unknowing tenants were evicted, Congress did not include an innocence exception despite the fact it amended the statute thereafter. *Id.; National Affordable Housing Act*, Pub.L. 1012625, § 504, 104 Stat. 4079 (1990). Thereafter, HUD interpreted the statute to grant discretion to PHAs to evict ignorant tenants. (*Id.* 56 Fed.Reg. at 51567.

There is no merit to the argument that Congress intended for an "innocent tenant" defense to be read into subsection (6). Congress would have expressly provided for the defense had it intended for the Tenants to be allowed to use it. It did so in other sections of the same Act, but omitted the defense in 42 U.S.C. § 1437d(l)(6). Simply, the defense cannot be read into the statute.

2. The Express Waiver Of The Waiting Period For A Preference Selection Is Evidence Of An Intent By Congress To Allow Evictions Of Ignorant Tenants.

Under 42 U.S.C. § 1437d(c)(4)(A), effective until 1996, Congress provided for tenant selection criteria as follows:

> (iii) prohibit any individual or family evicted from housing assisted under the chapter by reason of drug-related criminal activity from having a preference under any provisions of this subparagraph for three years . . . except that the agency may waive the application of this clause under standards established by the Secretary (which shall include waiver for any member of a family of an individual prohibited from tenancy under this clause who the agency determines clearly did not participate in and had no knowledge of such criminal activity. . . . "

Subsection d(c)(4)(A) required PHAs to allocate available housing units based on preferences determined by Congress. In that regard, preferences were given to the homeless, to those paying more than 50% of their income in rent, and to those who had been recently displaced from housing. 42 U.S.C. § 1437d(c)(4)(A)(i). Subsection

(iii) disqualified an individual or a family from receiving a preference for a period of three years if evicted because of drug-related criminal activity. However, subsection (iii) further provided a waiver of the waiting period for those who did not participate in, and had no knowledge of, the underlying criminal activity.

If Congress intended for tenants to be able to use ignorance as a defense to 42 U.S.C. § 1437d(l)(6), it would have no reason to provide a waiver of the waiting period for these tenants.

Clearly, the language evidences Congress' intent to give PHAs the discretion to evict tenants who did not participate in and had no knowledge of criminal activity. It also intended to make the impact of evictions less onerous for so called "innocent residents" by allowing them a preference. Congress sought to assist so called "innocent residents" by providing a preference not by way of a defense for eviction.

3. The Plain Language Of the Statute Forecloses Resort To Legislative History.

Given the plain statutory command, there is no reason to resort to legislative history. *Gonzalez, supra,* 520 U.S. at 6, citing *Connecticut National Bank v. Germain,* 503 U.S. 249, 254 (1992). "Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." *Gonzalez, supra,* at 8, citing *United States v. Wiltberger,* 18 U.S. 76, 5 Wheat. 76, 95-96, 5 L.Ed. 37 (1820).

Respondents contend that a statement in a 1990 Senate Report shows that Congress did not intend to evict innocent tenants. The report reads in pertinent part:

> The Committee anticipates that each case is judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be an appropriate course if the tenant has no knowledge of the criminal activities of his/her guests or have taken reasonable steps under the circumstances to prevent the activity.

S.Rep. No. 101-316, at 179 (1990).

The committee report was submitted prior to the 1996 amendment to the statute, wherein Congress provided PHAs even broader discretion by changing the statute's language from drug-related criminal activity "on or near" to "on or off" the premises. 42 U.S.C. § 1437d(l)(6) (1997). It is telling that Congress did not amend the statute to reflect a "knowledge" requirement by the tenant before eviction, despite the foregoing report, arguments and comments made by tenant organizations, including the ACLU. *Burton, supra*, 2001 WL 1379724, at *5. Clearly, that was not Congress' intent.

Instead, the committee report should be read in a manner consistent with the language of the remainder of the statute and the purpose of the Housing and Anti-Drug Abuse Acts. *Robinson v. Shell Oil Company*, 519 U.S. 337, 341 (1997).

In that regard, the Housing Act vests public housing agencies with "the maximum amount of responsibility in the administration of their housing programs." 42 U.S.C.

§ 1437. Hence, the committee report supports the proposition that Congress intended to provide local housing authorities with wide discretion in the administration of their programs and § 1437d(l)(6) provides them an "additional tool to enhance" their ability to deal with drug problems in public housing. 134 Cong. Rec. 33,148 (1988) (Statement of Rep. Wylie); *Rucker*, 237 F.3d at 1133 (Sneed, J., dissenting). (Pet. App. 45a).

To the extent the legislative history is considered here, it should be interpreted to give effect to the purpose of the pertinent statute. Otherwise, far from clarifying the statute, the legislative history only "muddies the waters" and provides an even stronger argument for avoiding legislative history. *Gonzalez*, 520 U.S. at 6, 116 S.Ct. at 1035.

D. The Statute Is Rationally Related To A Legitimate Housing Goal, Therefore, Is Not In Conflict With § 1437d(l)(1) Prohibiting Leases That Contain Unreasonable Terms And Conditions.

The Ninth Circuit majority, following the district court, found that § 1437d(l)(6) was "irrational" because it purportedly conflicted with 42 U.S.C. § 1437d(l)(1), prohibiting unreasonable terms and conditions in PHA leases.

However, a lease term is reasonable if it is rationally related to legitimate housing goal. *Richmond Tenants Organization, Inc. v. Richmond Redevelopment and Housing Authority*, 751 F.Supp. 1204, 1205-06 (E.D. Va. 1990). In this case, the Anti-Drug Abuse Act of 1988 reflects the dire circumstances faced by PHAs as evidenced by the

findings by Congress. (See 42 U.S.C. § 11901). Congress found drug-related crime in public housing to be "rampant," and imposed "a reign of terror on public housing tenants." *Id.* Tenants lived in fear of the violence and intimidation with which they were surrounded. *Id.* They were being provided neither safe nor decent living conditions. This lease term gives PHAs the ability to address this concern by evicting problem households.

On the other hand, because of the fear amongst tenants, PHAs were unable to get the cooperation and assistance needed from tenants for information leading to drug activity. The resulting legislation was, in part, aimed at obtaining the cooperation and support of public housing tenants in the fight against drugs. *Rucker*, 237 F.3d at 1135 (Snead, J. dissenting), citing *Drugs In Federally Assisted Housing: Hearing on F.566 before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, S. Doc. No. 101-234, at 27 (1989). (Pet. App. 49a).

The eviction of tenants without proof of their knowledge of the illegal activities provides the means wherein law-abiding tenants can feel safe. First, they can feel secure that those who participate in illegal activity will be evicted. Second, they can now feel safe enough to report drug activity without the fear of retaliation. To the extent tenants understand that they are not required to publicly accuse other tenants of illegal conduct and/or of violating lease agreements, they will be willing to come forward to provide pertinent information and PHAs may more efficiently fulfill the purpose for which the statute was created.

Indeed, evictions without fault are not unusual. The nature of a lease is contractual and lease provisions allowing the eviction of ignorant tenants for much less egregious conduct than that found in the present case are consistently upheld including, gambling, destruction and/or defacement of property, excessive noise made by household members or guests. (See *Minnesota Public Housing Authority v. Lor*, 591 N.W.2d 700, 704 (1999); *Shephard v. Dye*, 137 Wash. 180, 242 P. 381 (1926).)

The same is true outside the contractual context, under the doctrine of *respondeat superior*, the innocent principal or employer is liable for the torts of the agent or employee, committed while acting within the scope of his/her employment. As such, it is immaterial that an employee acts in excess of his authority or contrary to instructions. Rest.2d, Agency §§ 219, 243, et seq. The modern justification for this rule is a deliberate allocation of a risk. *Hinman v. Westinghouse Electric Co.*, 2 Cal.3d 956, 959, 471 P.2d 988, 88 Cal.Rptr. 188 (1970) quoting Dean Prosser. As such, liability is legally imposed on individuals without requiring that the individuals be at fault.

Indeed, this Court has previously determined that an innocent wife could not prevent forfeiture of a family-owned automobile used by her husband for illegal activity. *Bennis v. Michigan*, 516 U.S. 442, 449 (1996).

Public housing tenants need the protections that the subject statute provides. They are unable to go elsewhere and avoid the dangers illegal drug activity imposes upon them. Because they happen to be poor, they should not be forced to live under conditions that others more fortunate

can avoid. Moreover, the tenants in the present case executed leases acknowledging agreement to abide by the terms and conditions therein and had prior notice of the risk of eviction if they did not. Even tenants of low income housing must accept the obligation under contracts they execute for the privilege of receiving a place to live.

III. The Constitution Does Not Prohibit The Eviction Of Ignorant Tenants

A. The Purpose Of The Housing Act Justifies The Evictions Of Ignorant Tenants And Does Not Violate The Due Process Clause.

If a statute is rationally related to Congress' legitimate objectives, then it should be upheld. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 491 (1977). The Housing Act's provision to provide a safe, decent and affordable place to live for low-income families is a benefit, and a scarce one indeed. There is no constitutional guarantee of access to housing of a particular quality. *Lindsey*, 405 U.S. at 74, 92 S.Ct. 862. If the governmental purpose is sufficient to justify outright refusal of a benefit, it is sufficient to justify conditions on that benefit. *Nollan v. California Coastal Commission*, 483 U.S. 825, 836 (1987). Likewise, Congress has the authority to regulate and set terms and conditions in the receipt of funds and benefits allocated by the government. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-588 (1998), *Rust v. Sullivan*, 500 U.S. 173, 182 (1991). (See *Rucker*, 237 F.3d at 1138 (Sneed, J., dissenting)). (Pet. App. 54a-57a).

Congress limited the right to reside in public housing to those who fall within certain qualifications and who agree to certain terms and conditions, including the agreement to be responsible for the drug-related criminal activity of their household members and guests. Congressional legislation and HUD's implementing regulations provide PHAs with policies for public housing applicants, their qualifications and requirements. PHAs were also given the discretion to evict tenants for violating lease provisions. Eviction under OHA's lease ¶9(m), is directly relevant to the government's interest in providing a safe environment for low-income residents and eliminating drug-related criminal activity in public housing.

Moreover, this Court previously held that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Rucker*, 237 F.3d at 1140 (Sneed, J., dissenting) (Pet. App. 57a-58a), citing *Bennis v. Michigan*, 516 U.S. 442 (1996) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974)); *A.W. Goldsmith, Jr. Grant Co. v. United States*, 254 U.S. 505 (1921); *Van Oster v. Kansas*, 272 U.S. 465 (1926).

The Tenants' Due Process violation claim lacks merit.

B. Eviction Of A Public Housing Tenant For the Drug-Related Activity Of A Household Member Or Guest Is Remedial, Not Punitive; Therefore, Is Not An Excessive Fine In Violation Of The Eighth Amendment.

The purpose of the Eighth Amendment is to limit the government's power to punish. *Austin v. United States*,

509 U.S. 602, 609 (1993), citing *Browning v. Ferris*, 492 U.S. at 266-267. The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, "as punishment for some offense." *Id.* at 265; *United States v. Bajakajian*, 524 U.S. 321, 328, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1990).

In determining whether a particular "civil sanction" constitutes punishment for purposes of establishing an excessive fine, it is the purpose actually served by the sanction, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated. It is the purpose and intent of the sanction that is the "touchstone that determines the sanctions characterization as mere remedial or punitive, rather than simply its impact." *Austin v. United States*, 509 U.S. 602, 609-610 (1993).

The issue in *Austin* was whether the Excessive Fines Clause of the Eighth Amendment applied to forfeiture of property based on 21 U.S.C. §§ 881(a)(4) and (a)(7). *Id.* at 604. The Court looked at the history behind the forfeiture statute and found, historically, that Congress in passing the first forfeiture laws viewed forfeiture as a punishment and used the word "forfeit" as a word for fine. *Id.* at 613-614. The purpose of the first forfeiture law was intended for owners of ships and cargo involved in customs offenses. *Id.*

The Anti-Drug Abuse Act provided an additional tool to eliminate drug-related activity in public housing and the harmful consequences to other tenants of the conduct. Moreover, the ultimate purpose of the Housing Act is to provide a decent place for low-income families to live. Section 1437d(l)(6) facilitates the purpose of these

Acts and, clearly, was not established to punish tenants whose household members or guests engage in illegal activity.

Moreover, the purpose behind the pertinent statute herein is certainly not a means in which to enrich the government's power by punishing its citizens. See *Browning-Ferris Industries of Vt., Inc. v. Kaeco Disposal, Inc.*, 492 U.S. 257, 264-268, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). It is a regulation to provide decent housing and allocate scarce government resources to deserving families. Eviction under the circumstances of the instant case is not punitive, but is in the nature of a remedy under contractual law. It returns the parties to as good a position as that occupied . . . before the contract was made." *Corbin on Contracts*, § 996.

Moreover, no court has held that governmental enforcement of a valid lease provision for rental property constitutes an excessive fine because to do so would be to "federalize the substance law of landlord tenant relations." *Rucker*, 237 F.3d at 1140 (Sneed, J., dissenting) (Pet. App. 58a) (citing *Lindsey*, 405 U.S. at 68, 92 S.Ct. 862).

Evictions under § 1437d(l)(6) are not punitive and do not constitute excessive fines.

C. Eviction Under The Statute Does Not Violate A Tenant's Rights to Freedom of Association.

Regulations that burden certain constitutional rights are valid if reasonably related to legitimate government interests. *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Bazette v.*

McGinnis, 124 F.3d 774 (6th Cir. 1997), cert. denied, 141 L.Ed.2d 739 (1998).

In *Lyng v. International Union, United Auto., L & Agic. Implemented Workers of America, UAW*, 485 U.S. 360, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988), this court upheld the denial of food stamps to an entire household because a single member of that household was on strike. It was argued in *Lyng*, that the statute in question unconstitutionally burdened the right to association because it "impermissibly directs the onus of the striker's action against the rest of the family." *Lyng*, 485 U.S. at 363, 108 S.Ct. 1184. The court held that the withdrawal of a government benefit did not pose a significant danger to the exercise of the right to association. *Id.* at 367 n. 5, 108 S.Ct. 1184. Despite a determination that the statute imposed a hardship on family members, the Court deferred to the Congressional view of "what constitutes wise economic or social policy" and upheld the statute. *Id.* at 372, 108 S.Ct. 1184 (quoting *Dandridge v. Williams*, 397 U.S. at 486, 90 S.Ct. 1153.)

In this case, government has an interest in providing safe and decent housing to low-income families and in eliminating drug-related crime and violence in public housing. In determining who may reside in federally subsidized housing, Congress must draw distinctions "in order to make allocations from a finite pool of resources." *Lyng*, 485 U.S. at 373, 108 S.Ct. 1184. It is more than appropriate to allocate these finite resources to those who will assure a drug-free environment.

IV. Eviction Is Not Mandatory But Discretionary.

It is critical to note that the eviction provision at issue here is not mandatory. Indeed, PHAs are authorized to use discretion and encouraged to use their humane judgment when looking at each case and deciding each on its independent merits.

There are no facts in this case to show that OHA acted indiscriminately and/or was abusive. It did what was expected of it and decided each case on its own merits and used its humane judgment in deciding each case.

For instance, OHA gave Herman Walker two opportunities to eliminate the drug activity in his unit before commencing eviction proceedings. Mr. Walker lives in a senior citizen complex. It was OHA's obligation to his neighbors to eliminate the drug-related criminal activity in that building.

And, indeed, it is telling, that subsequent to Rucker's daughter leaving the unit in which Rucker is a tenant, OHA dismissed the unlawful detainer action against her, clearly recognizing that the dangers presented by Rucker's daughter's drug-related activities dissipated with her departure.

CONCLUSION

For all the foregoing reasons, this Court should reverse the en banc decision of the Ninth Circuit Court of Appeals and vacate the injunction issued by the United States District Court for the Northern District of California.

Respectfully submitted,

GARY T. LAFAYETTE
Counsel of Record
SUSAN T. KUMAGAI
LAFAYETTE & KUMAGAI LLP
100 Spear Street, Suite 400
San Francisco, California 94105
(415) 357-4600